Writ Appeal No.85 of 2006

Per G.S. Singhvi, CJ

Whether the appellant, who was appointed as Managing Trustee of Anumasamudram Peta Mosque and Tomb Estate, Nellore District (for short 'the mosque') for a fixed period of six months, has the right to continue in that position after expiry of the term specified in the order of appointment is the question which arises for determination in this appeal filed against the order dated 23.11.2005 passed by the learned Single Judge in Writ Petition No.12141 of 2005.

For deciding the aforementioned question, we may briefly notice the facts:

In pursuance of the notices issued by the Administrator of A.S. Peta Mosque and Tomb Estate-cum-Additional Senior Civil Judge, Nellore (respondent), the appellant applied for appointment as Managing Trustee of the mosque. He was interviewed by the selection committee, which recommended his name. Thereafter, vide order dated 10.9.2004, the respondent appointed the appellant as Managing Trustee of the mosque for a fixed period of six months. For the sake of convenient reference, the relevant portions of that order are re-produced below:

> "Consequent upon the selection held on 8.9.2004, Mr. Syed Aqueel, H.No.9-4-87/B/21, Minor Colony, Tolichowki, Hyderabad has been selected for appointment as Managing Trustee of A.S. Peta Mosque and Tomb Estate, A.S.Peta. He is hereby appointed as Managing Trustee of A.S. Peta Mosque and Tom Estate subject to the condition of the Scheme dated 25.4.1918 passed in O.S.No.50/1913 and Rules framed thereunder tentatively for a period of six months from the date of assumption of charge.
>
> His appointment is purely temporary and his services are liable to be terminated at any time without notice if his services are found unsatisfactory. If his services are found satisfactory during the said period of six months, he will be considered for extension pursuant to

the Scheme and the Rules.

He should furnish security for Rs.20,000/- (Rupees twenty thousand only) before he assumes charge of the Office of the Managing Trustee, A.S.Peta Mosque and Tomb Estate, A.S. Peta from the present in charge Trustee i.e. Peish-Imam and this terminates the services of Peish-Imam as in charge Trustee."

The appellant assumed the charge on 16.9.2004 and continued to work as Managing Trustee till 10.1.2005, on which date he was forced to handover charge in compliance of interim order dated 22.12.2004 passed in W.P.M.P.No.24736 of 2004 in Writ Petition No.18802 of 2004 – Mohammad Anwar Basha vs. Administrator of Anumasamudrampeta Mosque & Tomb Estate-Cum-Additional Senior Civil Judge, Nellore, Nellore District and another. That petition was finally dismissed by the learned Single Judge, vide his order dated 1.3.2005 and Letters Patent Appeal No.423 of 2005 against that order was summarily dismissed by the Division Bench on 15.3.2005. Thereafter, the appellant approached the respondent for being allowed to function as Managing Trustee of the mosque, but the latter did not accept his request, apparently because the tenure of his appointment had ended.

In the meanwhile, on receipt of some complaint against the functioning of the appellant as Managing Trustee of the mosque, the respondent got an enquiry conducted through Shaik Abdul Jameel, Junior Assistant of Court of Additional Senior Civil Judge. In his report, Shri Shaik Abdul Jameel observed that if the appellant is reappointed as Managing Trustee of the mosque, the peace and tranquility of the Darga will be disturbed. It was further observed that the appellant was sowing communal differences between the Hindus and Muslims. On receipt of the report, respondent passed order dated 17.5.2005 whereby he declined to give fresh appointment to the appellant. Paragraphs 2 and 3 of that order are reproduced below:

"Consequent upon the suspension of the operation of the order of the under-signed, dated 10.9.2004 by the Hon'ble High Court of A.P. in W.P.M.P.No.24736 of 2004 in W.P.No.18802 of 2004, Sri Sd. Aqueel was directed to handover charge of his post to Peish-Imam with immediate effect pending disposal of the Writ Petition No.18802 of 2004 on the file of High Court of A.P. vide 3rd reference cited.

Sri Md. Abdul Pasha, Peish-Imam, A.S. Pet Mosque & Tomb Estate took complete charge of the post of Trustee from Sd. Acqueel by 10.01.2005. Sri Sd. Aqueel had discharged his functions from 16.9.2004 till 10.1.2005 as Managing Trustee of A.S. Pet Mosque & Tomb Estate. There were allegations made against him that he, who hails from Hyderabad, was creating Hindu-Muslim communal differences and discriminating Hindu devotees.

Sri Sk. Abdul Jameel, Junior Assistant of Addl. Senior Civil Judge's Court, Nellore was deputed to inquire into the allegations made against the then Trustee and also against in charge Trustee. He enquired and submitted his report 5th cited. As per his report, if Sd. Aqueel is re-appointed as regular Trustee to aspect Mosque & Tomb Estate, the peace and tranquility will be disturbed to the Darga. It further reveals that Aqueel was sowing communal differences between Hindus and Muslims and that the in charge Trustee is unable to perform his duties as Peish-Imam as well as Trustee. On the basis of his report, the services of Syed Aqueel are not satisfactory, that fresh appointment for the post of Trustee requires immediately, and accordingly, Syed Aqueel is terminated from Trusteeship."

The appellant represented against the observations contained in the aforementioned order, but could not persuade the respondent to re-appoint him. He then filed Writ Petition No.12141 of 2005 for quashing order dated 17.5.2005 by asserting that the same is vitiated due to violation of the rules of natural justice and mala fide exercise of power. He pleaded that after dismissal of Writ Petition No.18802 of 2004 filed by Mohammad Anwar Basha, there could be no justification to deny appointment to him and, in any case, the impugned order could not have been passed without holding enquiry and without giving him reasonable opportunity of hearing.

The learned Single Judge dismissed the writ petition by observing that even though the order impugned by the petitioner is vitiated due to violation of the rules of natural justice, a writ of mandamus cannot be issued in his favour because the term of his appointment has already ended.

Shri Mirza Nissar Ahmad Baig, learned counsel for the appellant reiterated that order dated 17.5.2005 is vitiated due to gross violation of the rules of natural justice, inasmuch as the appellant was condemned unheard and argued that the learned Single Judge committed a serious error by refusing to nullify that order and issuing direction to the respondent to reappoint the appellant. He further argued that even though the appellant was appointed on temporary basis for fixed period of six months, he should be deemed to be on probation and the respondent could not have terminated his services by a stigmatic order and that too without holding an enquiry and without giving reasonable opportunity of hearing. Another argument of the learned counsel is that even though the term of the appellant's appointment came to an end on 9.3.2004, he was entitled to be reappointed because no other person had been selected by the competent authority.

In our opinion, there is no merit in either of the arguments of the learned counsel. A reading of order dated 10.9.2004, of which the extracts have been reproduced above, makes it clear that the appellant was appointed for a fixed term of six months from the date of assumption of the charge. His appointment was treated as purely temporary with the rider that his services are liable to be terminated at any time without notice, if the same were found unsatisfactory. His case for extension could be considered if his services were found satisfactory. There is nothing in the language of that order from which it can be inferred that he was appointed on probation. That apart, learned counsel for the appellant could not show that in terms of the scheme dated 25.4.1918 passed in O.S.No.50 of 1913 and rules framed thereunder, an appointment made on temporary basis for a fixed period can be treated as one made on probation. Therefore, it is not possible to use the judicial process for bringing out deemed change in the texture and contents of the order of appointment and then declare the action of the respondent as nullity on the ground of violation of the rules of natural justice.

We are further of the view that even if the appellant is treated as appointed on probation, the same will be deemed to have come to an end on 15.3.2005 because he had assumed charge on 16.9.2004. It is true that on account of interim order dated 22.10.2004 passed in W.P.M.P.NO.24736 of 2004 in W.P.No.18802 of 2004, the appellant could not serve for full term of six months, but that itself cannot justify issuance of a *mandamus* to the respondent to extend the term of his appointment. At best, he can claim monetary benefits in respect of the remaining period of his six

months tenure.

The argument of the learned counsel that order dated 17.5.2005 is punitive and the same is liable to be nullified on the ground of violation of the principles of natural justice, which was accepted by the learned Single Judge, sounds attractive, but, on a closer scrutiny, we are unable to agree with the learned Single Judge and accept the argument of the learned counsel. Even if the period when the order of stay passed in W.P.M.P.No.24736 of 2004 was in operation is excluded, the term of the appellant's appointment (six months) would have ended on 5.5.2005. For the purpose of extending the term of the appellant's appointment, the respondent was duty bound to consider his past service record and conduct. During the period of his working as Managing Trustee, some complaints were received containing the allegation that he was creating communal differences between the Hindus and Muslims and discriminating Hindu devotees. For verifying this allegation, the respondent asked Shaik Abdul Jameel, Junior Assistant attached to the Court of Additional Senior Civil Judge, Nellore to enquire into. The latter reported that the allegation was correct. Thereafter, the respondent passed order dated 17.5.2005 refusing to give fresh appointment to the appellant. While doing so, he did refer to the observations contained in the report of Shaik Abdul Jameel, but this cannot lead to an inference that the order is punitive or stigmatic and calls for interference by the Court on the ground of violation of the rule of *audi alterm partem*.

The width of the rights of an employee who holds civil post and that of the employer to terminate the services of the employee appointed on permanent or temporary basis or on probation have become subject matter of litigation in different courts including the Supreme Court. In **Parshotam Lal Dhingra vs. Union of India,** the Constitution Bench of the Supreme Court considered the various facets of this issue. The majority of the Constitution Bench referred to the provisions of Articles 309, 310 and 311 of the Constitution of India along with Section 96B(1) of the Government of India Act, 1915 and Section 240(1) of the Government of India Act, 1935 and held:

> "Shortly put, the principle is that when a servant has right to a post or to a rank either under the terms of the contract of employment,

express or implied, or under the rules governing the conditions of his service, the termination of the service of such a servant or his reduction to a lower post is by itself and prima facie a punishment, for it operates as a forfeiture of his right to hold that post or that rank and to get the emoluments and other benefits attached thereto. But if the servant has no right to the post, as where he is appointed to a post, permanent or temporary either on probation or on an officiating basis and whose temporary service has not ripened into a quasi-permanent service as defined in the Temporary Service Rules, the termination of his employment does not deprive him of any right and cannot, therefore, by itself be a punishment.

One test for determining whether the termination of the service of a government servant is by way of punishment is to ascertain whether the servant, but for such termination, had the right to hold the post. If he had a right to the post as in the three cases hereinbefore mentioned, the termination of his service will by itself be a punishment and he will be entitled to the protection of Article 311.

In other words and broadly speaking, Article 311(2), will apply to those cases where the government servant, had he been employed by a private employer, will be entitled to maintain an action for wrongful dismissal, removal or reduction in rank. To put it in another way, if the government has, by contract, express or implied, or, under the rules, the right to terminate the employment at any time, then such termination in the manner provided by the contract or the rules is, prima facie and per se, not a punishment and does not attract the provisions of Article 311.

The majority of the Constitution Bench then considered the eventualities in which the termination of the services of an employee can be termed as punitive and held:

"Any and every termination of service is not a dismissal, removal or reduction in rank. A termination of service brought about by the exercise of a contractual right is not per se dismissal or removal, as has been held by this Court in ***Satish Chander Anand* v. *Union of India, AIR 1953 SC 250*** *(supra)*. Likewise the termination of service by

compulsory retirement in terms of a specific rule regulating the conditions of service is not tantamount to the infliction of a punishment and does not attract Article 311(2), as has also been held by this Court in ***Shyam Lal* v. *State of Uttar Pradesh*, 1955-I SCR 26 : (AIR 1954 SC 369)**. . . . .In short, if the termination of service is founded on the right flowing from contract or the service rules then, prima facie, the termination is not a punishment and carries with it no evil consequences and so Article 311 is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Article 311 must be complied with. As already stated, if the servant has got a right to continue in the post, then, unless the contract of employment or the rules provide to the contrary, his services cannot be terminated otherwise than for misconduct, negligence, inefficiency or other good and sufficient cause. A termination of the service of such a servant on such grounds must be a punishment and, therefore, a dismissal or removal within Article 311, for it operates as a forefeiture of his right and he is visited with the evil consequences of loss of pay and allowances. It puts an indelible stigma on the officer affecting his future career….. But the mere fact that the servant has no title to the post or the rank and the Government has, by contract, express or implied, or under the rules, the right to reduce him to a lower post does not mean that an order of reduction of a servant to a lower post or rank cannot in any circumstances be a punishment. The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences…. . . The use of the expression “terminate” or “discharge” is not conclusive. In spite of the use of such innocuous expressions, the court has to apply the two tests mentioned above, namely, (*1*) whether the servant had a right to the post or the rank, or

(*2*) whether he has been visited with evil consequences of the kind hereinbefore referred to? If the case satisfies either of the two tests then it must be held that the servant has been punished and the termination of his service must be taken as a dismissal or removal from service . . . . . ." (underling is ours)

The above exposition of law has been reiterated and followed in almost all subsequent decisions of the Supreme Court and various High Courts, which have been rendered in the cases involving challenge to the termination of the services of the employees appointed on temporary basis or on probation.

In **State of Orissa vs. Ram Narayan Das,** another Constitution Bench considered the question whether a probationer can be discharged in the manner provided by Rule 55B of the Civil Services (Classification, Control and Appeal) Rules, and held:

> "A probationer can be discharged in the manner provided by R. 55B of the Civil Services (Classification, Control and Appeal) Rules. Mere termination of employment does not carry with it "any evil consequences" such as forfeiture of pay or allowances, loss of seniority, stoppage or postponement of future chances of promotion, etc., An order discharging a public servant, even if a probationer, in an enquiry on charges of misconduct, negligence, inefficiency or other disqualification, may appropriately be regarded as one by way of punishment, but an order discharging a probationer following upon an enquiry to ascertain whether he was fit to be confirmed, is not of that nature. And to such a case Art. 311(2) does not apply." (Emphasis added)

In **I.N. Saksena vs. State of Madhya Pradesh,** their Lordships of the Supreme Court held that when there are no express words in the impugned order itself which throw a stigma on the Government servant, the Court would not delve into secretariate files to discover whether some kind of stigma could be inferred on such research.

In **Shamsher Singh vs. State of Punjab** (1974) 2 SCC 831, the Seven Judges Bench of the Supreme Court considered the question whether the services of the appellants who were serving as judicial officers on probation could be terminated on

the basis of an enquiry got conducted by the High Court through the vigilance department of the State. While criticizing the High Court's approach in handing over the enquiry to an outside agency, their Lordships held that action taken on the basis of the vigilance report which contained finding of guilty in respect of specific charges of misconduct levelled against the officers amounted to stigma. Their Lordships further held that form of the order is not conclusive and in appropriate case the Court can lift the veil to find out the true character of the order terminating the services of the employee. Speaking for the Bench, Ray C.J. observed:

> "The form of the order is not decisive as to whether the order is by way of punishment and that even an innocuously worded order terminating the services may in the facts and circumstances of the case establish that an enquiry into the allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311(2)."

In **State of Maharashtra vs. Veerappa R. Saboji** (1979) 4 SCC 466, the Supreme Court upheld the termination of the services of the respondent who was working as a judicial officer on probation and observed:

> "Ordinarily and generally the rule laid down in most of the cases by this Court is that you have to look to the order on the face of it and find whether it casts any stigma on the Government servant. In such a case there is no presumption that the order is arbitrary or mala fide unless a very strong case is made out and proved by the government servant who challenges such an order."

In **Oil and Natural Gas Commission vs. Dr. M.D.S. Iskender Ali,** the Supreme Court held that even if misconduct, negligence and inefficiency may be the motive or the inducing factor which influences the authority to terminate the service of the employee on probation, such termination cannot be termed as penalty or punishment.

In **Union of India vs. P.S. Bhatt** the Supreme Court reversed the order of Andhra Pradesh High Court which had quashed the termination of the respondent's service on the ground of violation of the rules of natural justice and held as under:

> "Even if misconduct, negligence, inefficiency may be the motive

> or the inducing factor which influences the authority to terminate the service of the employee on probation, such termination cannot be termed as penalty or punishment. Loose talks and filthy and abusive language which had been used against the Station Director and the other officers may legitimately in the facts and circumstances of the case lead to the formation of a reasonable belief in the minds of the authorities that the person behaving in such fashion is not a suitable person to be employed as a Producer. Even if this undesirable conduct on the part of the respondent may be considered to the motive or the inducing factor which influenced the authorities to pass the impugned order, the said order cannot be said to be by way of punishment." (emphasis added)

The facts of that case were that the respondent while he was holding the post of Producer, the Station Director submitted a report to the Director General, All India Radio casting adverse reflection on the respondent's conduct. The Station Director reported that respondent had conducted himself in a manner not conducive to the discipline of the office and had indulged in loose talks and use of filthy language. In the backdrop of this report, the respondent was reverted to the post of Announcer. The Andhra Pradesh High Court quashed the order of reversion on the ground that it was punitive and was not preceded by an inquiry. Their Lordships of the Supreme Court noted the contents of the report and then observed at page 765:

> "On a proper consideration of these facts, in our opinion, it cannot be said that the impugned order was passed by way of punishment; and, in our view, the High Court was in error in arriving at the finding that the impugned order was by way of punishment, as the report of the Station Director had influenced the Director General to pass the said order. Loose talks and filthy and abusive language which had been used against the Station Director and the other officers may legitimately in the facts and circumstances of the case lead to the formation of a reasonable belief in the minds of the authorities that the person behaving in such fashion is not a suitable person to be employed as a Producer. This undesirable conduct on the part of Shri Bhatt might have been the motive for terminating the employment on

probation and for reverting him to his old post of Announcer."

I n **Anoop Jaiswal vs. Government of India and another**, the Supreme Court referred to the earlier judgments in **State of Punjab vs. Sukh Raj Bahadur**, **Union of India vs. R.S. Dhaba**, **State of Bihar vs. Shiva Bhikshuk Misra R.S. Sial vs. State of U.P**., **State of U.P. vs. Ram Chandra Trivedi, I.N. Saksena vs. State of Madhya Pradesh** (3 supra) and **Samsher Singh vs. State of Punjab** (4 supra) and held:

> "It is, therefore, now well settled that where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the Court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee."

In that case the Supreme Court found that the services of the petitioner who was a probationer IPS Officer has been terminated on the basis of a specific allegation of misconduct and held that it was punitive in character.

In **Governing Council of Kidwai Memorial Institute of Oncology, Bangalore vs. Dr. Pandurang Godwalkar and another**, the Supreme Court discussed the rights of an employee who is on probation and laid down the following proposition of law:

> "If an employee who is on probation or holding an appointment on temporary basis is removed from the service with stigma because of some specific charge, then a plea cannot be taken that as his service was temporary or his appointment was probation, there was no requirement of holding any enquiry, affording such an employee an opportunity to show that the charge leveled against him is either not true or it is without any basis. But whenever the service of an employee is terminated during the period of probation or while his appointment is on temporary basis, by an order of termination simpliciter after some preliminary enquiry it cannot be held that as some enquiry had been made against him before the issuance of order

of termination it really amounted to his removal from service on a charge as such penal in nature. When an appointment is made on probation, it pre-supposes that the conduct, performance, ability and the capacity of the employee concerned have to be watched and examined during the period of probation. He is to be confirmed after the expiry of probation only when his service during the period of probation is found to be satisfactory and he is considered suitable for the post against which he has been appointed. The principle of tearing of the veil for finding out the real nature of the order shall be applicable only in a case where the Court is satisfied that there is a direct nexus between the charge so levelled and the action taken. If the decision is taken, to terminate the service of an employee during the period of probation, after taking into consideration the overall performance and some action or inaction on the part of such employee then it cannot be said that it amounts to his removal from service as punishment.It need not be said that the appointing authority at the stage of confirmation or while examining the question as to whether the service of such employee be terminated during the continuance of the period of probation, is entitled to look into any complaint made in respect of such employee while discharging his duties for purpose of making assessment of the performance of such employee. Even if such employee while questioning the validity of an order of termination simpliciter brings on the record that some preliminary enquiry or examination of some allegations had been made, that will not vitiate the order of termination". (Underlining is ours).

In that particular case, the Supreme Court reversed the judgment of Karnataka High Court and held that the decision taken by the Governing Council of Institute to terminate the services of the respondent after considering different reports relating to the work and conduct of the respondent cannot be treated as punitive.

In **Hukam Chand Khundia vs. Chandigarh Administration**, the Supreme Court held that the termination of the appellant's service, who was holding the post of Clerk under District and Sessions Judge, Chandigarh on the ground of unsatisfactory service was not punitive. Their Lordships took notice of the fact that successive judicial officers under whom the appellant had worked, found that his

integrity was questionable and held that this factor could be taken into consideration by the District Judge for forming an opinion that the employee was not fit to be continued in service.

In **Kunwar Arun Kumar vs. U.P. Hill Electronics Corporation Ltd., and others**, the termination of the appellant's service, who was on probation was upheld by the Supreme Court by making the following observations:

> "During the period of probation, the authorities are entitled to assess the suitability of the candidates and if it is found that the candidate is not suitable to remain in service they are entitled to record a finding of unsatisfactory performance of the work and duties. Under these circumstances, necessarily the appointing authority has to look into the performance of the work and duties during the period of probation and if they record a finding that during that period, the work and performance of the duties were unsatisfactory, they are entitled to terminate the service in terms of the letter of appointment without conducting any enquiry. That does not amount to any stigma. If the record does not support such a conclusion reached by the authorities, a different complexion would arise. In the presence case they have recorded the finding that the petitioner was regularly absent on one ground or the other. Under these circumstances, the respondents terminated his services. There is no illegality in the action taken by the respondents."

In **High Court of Judicature at Patna vs. Pandey Madan Mohan Prasad Sinha and others,** the Supreme Court reversed the decision of the Patna High Court and upheld the termination of the respondent's service. The facts of that case were that while he was holding the post of Munsiff as a probationer, the respondent had earned several adverse remarks during the period from 1976 to 1982. In the course of an inspection by a High Court Judge in 1983, the conduct and antecedence of the respondent were reported to be very much undesirable and unbecoming of a judicial officer. Several complaints touching his integrity with respect to judicial work and his character and morality were also received. All these factors were taken into consideration by the High Court on administrative side and it was decided not to continue his service. The writ petition filed by the petitioner was allowed by the High Court on the ground that some of the adverse remarks recorded on the Annual

Confidential Report of the respondent had not been communicated to him. The High Court held that the action taken against him was punitive. Allowing the appeal of the High Court, their Lordships of the Supreme Court observed as under:

> "A probationer does not have a right to hold the post during the period of probation. The position of a probationer cannot be equated with that of an employee who has been substantively appointed on a post and has a right to hold that post. An order terminating the services of a probationer can be questioned only if it is shown that it has been passed arbitrarily or has been passed by way of punishment without complying with the requirements of Article 311(2) of the Constitution. Since a probationer has no right to hold the post on which he has been appointed on probation, he cannot claim a right to be heard before an order terminating his services is passed. The obligation to communicate the adverse material to a person before taking action against him on the basis of the said material is a facet of the principles of natural justice. But principles of natural justice have no application in the case of termination of the services of a probationer during the period of probation since he has no right to hold the post. It is, therefore, not possible to hold that there is an obligation to communicate the adverse material to a probationer before a decision is taken on the basis of the said material that he is not fit for being retained in service. Such material can be relied upon to show that such a decision does not suffer from the vice of arbitrariness and is not capricious. Even with respect to persons who have been substantively appointed on a post and have a right to hold that post, it has been held that the failure to communicate the adverse remarks in the service record would not vitiate the order of compulsory retirement." (underling is ours)

In **Radhey Shyanm Gupta vs. U.P. State Agro Industries Corporation Ltd.,**, the Supreme Court undertook an exhaustive review of various judicial precedents and culled out the following propositions:

> " (i) The termination of the services of a temporary servant or one

on probation, on the basis of adverse entries or on the basis of an assessment that his work is not satisfactory will not be punitive inasmuch as the above facts are merely the *motive* and not the foundation. The reason why they are the motive is that the assessment is not done with the object of finding out any misconduct on the part of the officer. It is done only with a view to decide whether he is to be retained or continued in service. The position is not different even if a preliminary enquiry is held because the purpose of a preliminary enquiry is to find out if there is prima facie evidence or material to initiate a regular departmental enquiry. The purpose of the preliminary enquiry is not to find out misconduct on the part of the officer and if a termination follows without giving an opportunity, it will not be bad. Even in a case where a regular departmental enquiry is started, a charge-memo issued, reply obtained, and an enquiry officer is appointed — if at that point of time, the enquiry is dropped and a simple notice of termination is passed, the same will not be punitive because the enquiry officer has not recorded evidence nor given any findings on the charges. The departmental enquiry was stopped because the employer was not sure of establishing the guilt of the employee. The employer was entitled to say that he would not continue an employee against whom allegations were made the truth of which the employer was not interested to ascertain. In fact, the employer by opting to pass a simple order of termination as permitted by the terms of appointment or as permitted by the rules was conferring a benefit on the employee by passing a simple order of termination so that the employee would not suffer from any stigma which would attach to the rest of his career if a dismissal or other punitive order was passed. The above are all examples where the allegations whose truth has not been found, and were merely the *motive*."

(ii) But in cases where the termination is preceded by an enquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the officer and where on the basis of such a report, the termination order is issued, such an order will be violative of the principles of natural justice inasmuch as the purpose of the enquiry is to find out the truth of the allegations with a

view to punish him and not merely to gather evidence for a future regular departmental enquiry. In such cases, the termination is to be treated as *based* or *founded* upon misconduct and will be punitive. These are obviously not cases where the employer feels that there is a mere cloud against the employee's conduct but are cases where the employer has virtually accepted the definitive and clear findings of the enquiry officer, which are all arrived at behind the back of the employee — even though such acceptance of findings is not recorded in the order of termination. That is why the misconduct is the *foundation* and not merely the motive in such cases."

In **Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta,** the Supreme Court virtually conceded that it was extremely difficult for the Courts to draw a clear cut line of demarcation between the cases in which the termination of the services of a temporary employee or probationer by innocuous orders could be treated as punitive and the cases in which the allegations of misconduct may be treated as mere motive for terminating the services of such employee and held as under:

" (i) If findings are arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, simple order of termination is to be treated as "*founded*" on the allegations and will be bad. If the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be motive and not the foundation and the simple order of termination would be valid."

(ii) Material which amounts to stigma need not be contained in termination order of a probationer but might be contained in documents referred to in the termination order or in its annexures. Such documents can be asked for, or called for, by any future employer of

the probationer. In such a case, employee's interests would be harmed and therefore termination order would stand vitiated on the ground that no regular enquiry was conducted."

In **State of U.P. and another vs. Ram Krishnal and another**, the termination of the respondent's service on the ground of unsatisfactory performance was upheld with the observation that the rules of natural justice are not attracted in such a case.

In **V.P. Ahuja vs. State of Punjab**, the Supreme Court after making reference to the judgment in **Dipti Prakash Banerjee's** case and taking note of the averments contained in the written statement filed on behalf of the respondents before the High Court, held that the termination of the appellant's service was punitive.

In **Chandrak Prakash Shahi vs. State of U.P.**, the Supreme Court ruled that where the termination is preceded by a preliminary enquiry into the allegations of serious misconduct allegedly committed by the employee, the action of the employer will be treated as punitive. The facts of that case were that the appellant was appointed as Constable on 1.10.1985 in Pradeshik Armed Constabulary. He successfully completed training on 6.9.1986. Thereafter, he was posted on probation for two years. He successfully completed the period of probation without any blemish. His services were terminated on 19.7.1989 by a simple notice issued in terms of Rule 3 of the U.P. Temporary Government Servants (Termination of Service) Rules, 1975. The U.P. Public Service Tribunal declared the termination of the appellant's service as punitive because it was founded on a preliminary inquiry conducted by the concerned authority in the matter of quarrel between two other Constables. The order of the Tribunal was set aside by the High Court. On appeal, the Supreme Court took note of the various previous decisions and observed:

"The whole case law is thus based on the peculiar facts of each individual case and it is wrong to say that decisions have been swinging like a pendulum; right, the order is valid; left the order is punitive. It was urged before this Court more than once including in **Ram Chandra Trivedi** case that there was a conflict of decisions on the question of an order being a simple termination order or a punitive order, but every time the Court rejected the contention and held that the apparent conflict was on account of different facts of different cases requiring the principles already laid down by this Court in various

decisions to be applied to a different situation. But the concept of "motive" and "foundation" was always kept in view."

Their Lordships then reiterated the proposition laid down in **Radhe Shyam Gupta's** case (18 supra) in the following words: **"**The important principles which are deducible on the concept of "motive" and "foundation", concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations of misconduct and an inquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that inquiry, the order would be punitive in nature as the inquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against that employee. In this situation, the order would be founded on misconduct and it will not be a mere matter of "motive".

> "Motive" is the moving power which impels action for a definite result, or to put it differently, "motive" is that which incites or stimulates a person to do an act. An order terminating the services of an employee is an act done by the employer. What is that factor which impelled the employer to take this action? If it was the factor of general unsuitability of the employee for the post held by him, the action would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary inquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed thereafter, the order, having regard to other circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary inquiry."

In **Pavanedra Narayan Verma vs. Sanja Gandhi PGI of Medical Sciences and another,** the Supreme Court referred to various judicial precedence on the subject including **Parshotam Lal Dhinga vs. Union of India**, (1 supra), **Benjamin (A.G) vs. Union of India** , **Samsher Singh vs. State of Punjab** (4 supra), **State of U.P. vs. Kaushal Kishore Shukla**, **Radhey Shyam Gupta vs. U.P. State Agro Industries**

Corporation Ltd. (18 supra), **Dipti Prakash Banerjee vs. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta** (19 supra), **V.P. Ahuja vs. State of Punjab** (21 supra) and held that where the services of an employee is terminated on the ground of unsatisfactory work or conduct, the action of the employer cannot be termed as stigmatic. Some of the propositions laid down in that judgment are extracted below:

> "(i) One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (*a*) a full-scale formal enquiry (*b*) into allegations involving moral turpitude or misconduct which (*c*) culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld.
>
> (ii) Whenever, a probationer challenges his termination the court's first task will be to apply the test of stigma or the "form" test. If the order survives this examination the "substance" of the termination will have to be found out.
>
> **(iii)** Generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the language used in the termination order may be. Although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, is also not stigmatic. The decisions cited by the parties and noted by us earlier, also do not hold so. In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job."

In **State of Punjab vs. Bhagwan Singh**, the Supreme Court held that where the services of a probationer are terminated on the ground of unsatisfactory performance, the same cannot be treated as stigmatic merely because the competent authority takes into consideration adverse reports prepared by other officers.

In **Registrar of Gujarat High Court vs. C.G. Sharma**, the Supreme Court reversed the Judgment of the Division Bench of Gujarat High Court and upheld the termination of the respondent's service by making the following observations:

> ". . . . Since the overall performance of the respondent was found to be unsatisfactory by the High Court during the period of probation, it was decided by the High Court that the services of the respondent during the period of probation of the respondent be terminated because of his unsuitability for the post. In this view of the matter, order of termination simplicitor cannot be said to be violative of Articles 14, 16 and 311 of the Constitution of India. The law on the point is crystallized that the probationer remains probationer unless he has been confirmed on the basis of the work evaluation. Under the relevant Rules under which the respondent was appointed as a Civil Judge, there is no provision for automatic or deemed confirmation and/or deemed appointment on regular establishment or post, and in that view of the matter the contentions of the respondent that the respondent's services were deemed to have been continued on the expiry of the probation period are misconceived."

In **State of Punjab and others vs. Sukhwinder Singh**, the Supreme Court considered the legality of the termination of the respondent's service, who was on probation and whose service was terminated by way of discharge on the ground of absence from duty. After taking note of various judgments on the subject including some of those to which reference has been made hereinabove, the Supreme Court reversed the judgment and decree of the Punjab and Haryana High Court which had dismissed the second appeal filed by the appellant – State of Punjab and held as under:

> "No employee whether a probationer or temporary will be

discharged or reverted, arbitrarily, without any rhyme or reason. Where a superior officer, in order to satisfy himself whether the employee concerned should be continued in service or not makes inquiries for this purpose, it would be wrong to hold that the inquiry which was held, was really intended for the purpose of imposing punishment. If in every case where some kind of fact-finding inquiry is made, wherein the employee is either given an opportunity to explain or the inquiry is held behind his back, it is held that the order of discharge or termination from service is punitive in nature, even a bona fide attempt by the superior officer to decide whether the employee concerned should be retained in service or not would run the risk of being dubbed as an order of punishment. The decision to discharge a probationer during the period of probation or the order to terminate the service of a temporary employee is taken by the appointing authority or administrative heads of various departments, who are not judicially trained people. The superior authorities of the departments have to take work from an employee and they are the best people to judge whether an employee should be continued in service and made a permanent employee or not having regard to his performance, conduct and overall suitability for the job. A probationer is on test and a temporary employee has no right to the post. If mere holding of an inquiry to ascertain the relevant facts for arriving at a decision on objective considerations whether to continue the employee in service or to make him permanent is treated as an inquiry “for the purpose of imposing punishment” and an order of discharge or termination of service as a result thereof “punitive in character”, the fundamental difference between a probationer or a temporary employee and a permanent employee would be completely obliterated, which would be wholly wrong.

Where the police constable was appointed on probation about eight months back and was discharged from service on ground of absence from duty as he was not likely to become an efficient police officer, it cannot be said that the order was based upon the misconduct and was, therefore, punitive in nature, which should have been

preceded by a regular departmental inquiry." (Underlining is ours)

The above survey of judicial precedence give an impression that the Supreme Court has expressed conflicting views in different decisions. In some cases the order of termination of the probationer's service which was preceded by some enquiry by the employer into allegation of misconduct or consideration of adverse material was upheld on the ground that such enquiry was held and adverse material was considered only with a view to determine the suitability or fitness of the probationer to be continued in service. In other cases, the termination of the services of the probationers even by innocuous orders were nullified on the ground that the enquiry held into the allegations of misconduct constituted the foundation of the employer's action. This vacillation in the views of the Supreme Court does create difficulty for all other Courts including the High Courts in following the particular judicial precedent, but on a careful study of the ratio of various judgments one can steer clear and apply the correct test for determining whether or not the termination of the services of a probationer is punitive or stigmatic. In our view, while dealing with the cases involving adjudication of challenge to the termination of services of an employee who is on probation or the one appointed on temporary basis, the Court should keep in view the following principles:

1. A person appointed on temporary basis or on probation does not have the right to hold the post during the period of probation. The position of a person appointed on temporary basis or on probation cannot be equated with that of an employee who has been substantively appointed on a post and who has the right to hold that post.

2. When an appointment is made on probation, it pre-supposes that the conduct, performance, ability and the capacity of the employee concerned have to be watched and examined during the period of probation. He is to be confirmed after the expiry of the probation only when his service during the period of probation is found to be satisfactory and he is found to be suitable for the post.

3. An order terminating the services of a person appointed on temporary

basis or on probation can be questioned only if it is shown that the same has been passed arbitrarily or by way of punishment without complying with the rules of natural justice and the requirements of Article 311 of the Constitution, if applicable or it is shown that in the garb of termination of service by an innocuous order the employer has punished the probationer or temporary appointee.

4. For the purpose of forming an opinion on the suitability of a person appointed on temporary basis or on probation to be continued in service, the employer can take into consideration the reports relating to his performance, conduct, behaviour and such reports need not be conveyed to the employee concerned. The competent authority can also take into consideration other relevant factors for the purpose of determining the suitability and fitness of the probationer to be continued in service.

5. The decision on the question of suitability and fitness of a probationer can be taken during or at the end of the period of probation.

6. If the decision is taken to terminate the service of an employee appointed on temporary basis or on probation, after taking into consideration his overall performance, conduct, behaviour and some action or omission, then order cannot be treated as punitive.

7. Even if the employer holds a preliminary inquiry or gets such an enquiry made into the allegations of misconduct with a view to satisfy himself about the suitability of the employee to be continued n service, the ultimate decision to terminate the services of the probationer cannot be termed as stigmatic. However, if an inquiry is made at the back of the employee on the charges of misconduct and it is established that the allegation of misconduct constituted the foundation of the action taken by the employer, then the Court can declare the termination of the services of the employee as punitive and nullify the action of the employer on the ground of violation of the rules of natural justice.

8. For determining the true nature of the order of termination of the employee's service, the Court can lift the veil, examine the preceding and attendant facts and circumstances and then decide whether an innocuous order of termination of service is punitive or stigmatic. However, the principle of tearing of the veil for finding out the real nature of the order is to be applied only in a case where the Court is satisfied that there is a direct nexus between the charge levelled against the employee and the action taken by the employer.

By applying the above principles to the facts of this case, we hold that the decision taken by the respondent not to give fresh appointment to the appellant, which also implies that the respondent did not want to extend the term of appellant's appointment, does not suffer from any legal infirmity and a writ in the nature of *mandamus* cannot be issued directing the respondent to continue the appellant in service or appoint him afresh on the post of Managing Trustee of the mosque.

In the result, the appeal is dismissed.

G.S. SINGHVI, CJ

30th January, 2006

G. BHAVANI PRASAD, J

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